Supreme Court, U.S.
FILED
APR 22 1993
OFFICE OF THE CLERK

No. 92-1555

In The

Supreme Court of the United States

October Term, 1992

TIMOTHY JANSEN, DANIEL K. GOENS, ROBERT H. PRASSE, EVAN WOOD, and MARC E. MONAHAN;

and

WILLIAM NEAL, BRIAN CLEMENS, FRANK GORRASI, GREGORY HISSETT, and PHILIP S. RAMSTETTER;

and

DANIEL R. CORRY, NOAH H. GIBBS IV, TIMOTHY B. BURWICK, LAWRENCE D. CAPPEL, ROBERT HART, JEFFREY H. SWEET, MARK E. KREIMER, NICHOLAS SCHIBI, and TIMOTHY A. CUNNINGHAM,

Petitioners,

vs.

CITY OF CINCINNATI, SCOTT JOHNSON, CIVIL SERVICE COMMISSION, WILLIAM MILLER, and NORMAN WELLS;

and

TILFORD YOUNGBLOOD, RALPH NICHOLS,

and

THE PLAINTIFF CLASS CONSISTING OF BLACK APPLICANTS FOR AND BLACK EMPLOYEES OF THE DIVISION OF FIRE OF THE CITY OF CINCINNATI,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARK C. VOLLMAN
Counsel of Record
Assistant City Solicitor
Rm 214 City Hall
801 Plum Street
Cincinnati, Ohio 45202
(513) 352-3350

FAY D. DUPUIS
City Solicitor

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Can a valid consent decree entered into by a municipality to remedy prior racial discrimination be modified by a district court before the court makes the relevant findings of fact necessary to modify the decree?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT 5

I. REASONS FOR DENYING THE WRIT OF CERTIORARI 5

1. The Petitioners do not have a constitutionally protected property interest to be hired as governmental employees 6

2. There is not a split among the circuits on the issue presented in this case 7

II. QUESTION PRESENTED FOR REVIEW 12

Can a valid consent decree entered into by a municipality to remedy prior racial discrimination be modified by a district court before the court makes the relevant findings of fact necessary to modify the decree? 12

CONCLUSION 19

APPENDIX

1. OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN *BILLISH V. CITY OF CHICAGO* ..... App. 1

TABLE OF AUTHORITIES

Page

Ackermann v. United States, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950) 9, 16

Board of Educ. of Oklahoma City Public Schools v. Dowell, 498 U.S. 237, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991) 5, 16, 17, 18

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) 6

Browder v. Director, Dept. of Corrections, 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978) 16, 17

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S.Ct. 1010, 98 L.Ed.2d 976 (1989) 13

Commonwealth of Pennsylvania v. Flaherty, 983 F.2d 1267 (3rd Cir. 1993) 7, 8, 9

Hazelwood School District v. United States, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977) 10, 13

Howard v. McLucas, 871 F.2d 1000 (11th Cir. 1989) 13

Jansen v. City of Cincinnati, 977 F.2d 238 (6th Cir. 1992) (cited throughout brief to Petitioners' App. 14-30) ..... *passim*

Johnson v. Transportation Agency, 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987) 9, 14

Ledoux v. District of Columbia, 820 F.2d 1293 (D.C. Cir. 1987) 7, 10, 11

Mackin v. City of Boston, 969 F.2d 1273 (1st Cir. 1992) 11, 17, 18

Mallory v. Eyrich, 922 F.2d 1273 (6th Cir. 1991) 9, 16

Newark Branch, N.A.A.C.P. v. Town of Harrison, 940 F.2d 792 (3rd Cir. 1991) 7

TABLE OF AUTHORITIES – Continued

Page

Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694, 2717, 33 L.Ed.2d 570, 581 (1972) 6

Regents of University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978)..... 14

Rufo v. Inmates of Suffolk County Jail, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992)..... 9, 16, 17, 18

Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)..... 8

Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260, *reh'g denied*, 478 U.S. 1014, 106 S.Ct. 3320, 92 L.Ed.2d 728 (1986) (plurality opinion)..... 10, 13, 15

Youngblood v. Dalzell, 568 F.2d 506 (6th Cir. 1978) ..8, 10

Youngblood v. Dalzell, 804 F.2d 360 (6th Cir. 1986), *cert. denied*, 480 U.S. 935, 107 S.Ct. 1576, 94 L.Ed.2d 767 (1987)..... 1, 12, 14

Youngblood v. Dalzell, 925 F.2d 954 (6th Cir. 1991) .12, 14

STATEMENT OF THE CASE

The Petitioners are white males who sought and were denied positions as firefighters in the Fire Division of the City of Cincinnati (hereinafter, "Fire Division").[1] The Petitioners challenge as unconstitutional the City's use of a dual list system for hiring Fire Division recruits. The City of Cincinnati's (hereinafter, "City" or "City-Respondent") hiring practices stem directly from a Consent Decree entered into by the City.

In May 1974, the City-Respondents, the Legal Aid Society and the Ohio Attorney General entered into a Consent Decree that was approved by the United States District Court, Southern District of Ohio (Petitioners' App. 15). The stated purpose of the Consent Decree was to integrate the Fire Division of the City of Cincinnati (Petitioners' App. 15). Previous to the entering of the Consent Decree, there had been a "manifest imbalance" with regard to the racial composition within the Fire Division; specifically, only one half of one percent of the Fire Division personnel had been African-Americans. (Petitioners' App. 21-22, citing *Youngblood v. Dalzell*, 804 F.2d 360, 364 (6th Cir. 1986), *cert. denied, Cincinnati Firefighters Union, Local Union No. 48 v. Youngblood*, 480 U.S. 935, 107 S.Ct. 1576, 94 L.Ed.2d 767 (1987)).[2]

---

[1] Some of the Petitioners have subsequently earned positions in the Fire Division. The procedural posture with regard to all the Petitioners is accurately set forth in the first paragraph of the Petitioners' brief. The Respondents take issue with the remainder of the Petitioners' Statement of the Case.

[2] The decision of the Sixth Circuit from where this petition originates is found at the Petitioners' Appendix, at pages 13-30,

There are certain parts of the Consent Decree relevant in this appeal. Paragraph 22 of the Consent Decree provides that the City-Respondent " . . . shall adopt and seek to achieve a goal of hiring qualified minority persons. . . . Such goal shall be deemed to have been achieved when at least eighteen (18) percent of the Division of Fire Personnel of the City of Cincinnati are minority persons" (Petitioners' App. 48-49). Paragraph 23 provides that the City-Respondent:

> shall be deemed to have sought to achieve each stage of the work force composition goals when and as the above percentages of the Fire Division personnel are minority persons either on or within one month before or after the above dates; provided, however, that the Defendants shall be deemed to have sought to achieve such stage of the work composition goals in good faith if at least forty (40) percent of the total recruit class for any given year consists of minority persons.

(Petitioners' App. 41-42). Paragraph 34 of the Consent Decree governs the continuing jurisdiction of the District Court and the duration of the Consent Decree (Petitioners' App. 45-46). The last sentence of the Consent Decree states that "[a]t any time after the objectives of the decree have been achieved, the Defendants [City] may move this Court, on due notice, for dissolution of the Decree" (Petitioners' App. 46).[3]

---

and is hereinafter cited to that source. The decision is also bound at 977 F.2d 238.

[3] In addition to the hiring provisions, the Consent Decree contains provisions regarding advertisement of job openings to

The Fire Division assesses the qualifications of the applicants through a selection process which consists of a written examination, a physical ability test, a medical examination, a background investigation, and a psychological evaluation (Petitioners' App. 17). A score of seventy (70) or above on the written examination is passing, while the other components are scored on a pass/fail basis (Petitioners' App. 17). The City-Respondent has implemented the hiring goals pursuant to the Consent Decree by using a dual-list scheme (Petitioners' App. 16). The Fire Recruit Majority List consisted of non-minority candidates who successfully completed all phases of the Fire Recruit selection process, while the Fire Recruit Minority List consisted of minority candidates who successfully completed all phases of the Fire Recruit selection process (Petitioners' App. 16). The City-Respondent has taken sixty percent of its Fire Recruits from the Majority List and forty percent from the Minority List pursuant to paragraph 23 of the Consent Decree (Petitioners' App. 16).

Those applicants who passed all five phases of the selection process were placed on an eligible list and certified to the Fire Chief for consideration for hiring in the Fire Division (Petitioners' App. 17). Under Ohio Civil Service Rules, the Fire Chief has discretion to choose from the top three people on the eligible list. Ohio Revised Code § 124.27 (Petitioners' App. 68-70). Accordingly, the "Rule of Three" does not guarantee employment to those ranking highest on a given eligibility list, but merely

---

reach minority applicants, recruitment, promotions and record keeping (Petitioners' App. 31-46).

guarantees hiring consideration (Petitioners' App. 17). The Petitioners argue that because they scored higher on the written examination than some of the minority candidates who were hired as Fire Recruits, they should have been hired.

Had the dual-list system not been implemented in the years 1988-1990, however, significant under-representation in minorities would have resulted, as less than ten (10) out of one hundred and fifteen (115) applicants who would have been elevated pursuant to the Ohio Civil Service Rules would have been minorities (Petitioners' App. 24).

After the filing of cross motions for summary judgment, the District Court concluded as a matter of law that Paragraph 22 of the Consent Decree should be terminated because the eighteen percent hiring goal had been met (Petitioners' App. 12). The district court explicitly stated that the Consent Decree itself was not invalid; rather, the court concluded that because the eighteen percent goal set forth in paragraph 22 had been attained, the City was prohibited from applying that part of the Consent Decree (Petitioners' App. 9). The District Court did not address the concerns of a class of black applicants for and black employees of the Fire Division who had intervened in the case (Petitioners' App. 29; Petitioners' App. 1-12).[4] The African-American class claimed that the City-Respondent has engaged in racially discriminatory hiring practices in the last few years (Petitioners' App. 18).

---

[4] A class of black applicants for and black employees of the Fire Division were permitted to intervene by the Sixth Circuit. *Jansen v. City of Cincinnati*, 904 F.2d 336 (6th Cir. 1990).

On appeal, the United States Court of Appeals for the Sixth Circuit reversed the District Court. The Court of Appeals held that the District Court's "limited" order which dissolved only Paragraph 22 of the Consent Decree failed to read that section in conjunction with the rest of the Consent Decree (Petitioners' App. 26). More importantly, the Court of Appeals held that the District Court failed to adhere to the dictates of this Court's recent decision in *Board of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991), and to prior circuit precedent which set certain procedures for the modification of a consent decree (Petitioners App. 26-28).

ARGUMENT

I. REASONS FOR DENYING THE WRIT OF CERTIORARI

The Petitioners seek review of the court of appeals judgment claiming that "[t]he Sixth Circuit decision is at odds with this Court's prior rulings that a political subdivision's use of racial classifications deprives one of his or her constitutionally protected *property rights* under color of state law" (Brief of Petitioners 8) (emphasis added). Moreover, the Petitioners seek review claiming that "there exists a conflict between the circuits" (Brief of Petitioners 25). Pursuant to Supreme Court 10.1, if the Sixth Circuit's decision had in fact been at odds with this Court's previous cases or if the decision had caused a split among the circuits, these two factors could lend justification for this Court to carefully review whether to

grant the Petition for Writ of Certiorari. In this case, however, both of these factors are absent. Accordingly, because the Petitioners have not established any inconsistent treatment of the issue in this case, this Court should deny the Petitioners' request for the Writ of Certiorari.

1. The Petitioners do not have a constitutionally protected property interest to be hired as governmental employees.

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) and *Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 2717, 33 L.Ed.2d 570, 581 (1972) establish the parameters of an individual's "property" interests in the employment setting.[5] Specifically, this Court held that to have a property interest in a benefit, "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577. To determine whether such an entitlement is property subject to constitutional protection, state law should be referenced. *Roth*, 408 U.S. at 577.

In this case, it is clear that the Petitioners did not have an entitlement to government employment. The

---

[5] Although both cases revolve around due process clause challenges, this Court's analysis of property interests in the employment context applies with equal force to the equal protection clause challenge in the case *sub judice*.

Ohio civil service law which covered the hiring procedure for the Petitioners did not guarantee an entitlement to a job; on the contrary, the "Rule of Three" system "merely guarantees hiring consideration" (Petitioners' App. 17, applying plain language of Ohio Revised Code § 124.27). It is clear that the Petitioners did not have a "property interest" in their mere unilateral expectation of a position with the Fire Division. *E.g., Newark Branch, N.A.A.C.P. v. Town of Harrison*, 940 F.2d 792, 809-10 (3rd Cir. 1991), where the court, faced with an affirmative action plan implemented pursuant to a consent decree, cited *Roth* and *Perry v. Sinderman* and held that prospective employees' ranking on an eligibility list used for the purposes of hiring firefighters was not a property interest protected under the due process and equal protection clauses of the Federal Constitution.

2. There is not a split among the circuits on the issue presented in this case.

The Petitioners' second justification for seeking review is that there is a split among the circuits. The cases the Petitioners cite for support of their position, however, are not in conflict with the Sixth Circuit's decision below (Brief of Petitioners 24-25). The Petitioners cite *Commonwealth of Pennsylvania v. Flaherty*, 983 F.2d 1267 (3rd Cir. 1993) and *Ledoux v. District of Columbia*, 820 F.2d 1293 (D.C. Cir. 1987) for support of their claim that there is a circuit split.

Flaherty did not involve a consent decree, but rather involved the dissolution of a preliminary injunction "which prescribed a quota hiring system whereby for

every white male hired by the City, the City was enjoined to hire one qualifying African-American. . . . " 983 F.2d at 1267. Moreover, in 1975, when the district court judge had entered the preliminary injunction, no finding of discrimination was made. *Flaherty*, 983 F.2d at 1270. Rather, the preliminary injunction was entered into "entirely upon evidence that African-Americans as a whole scored lower on the examination than white Americans, and were thus disparately impacted by the exam." *Flaherty*, 983 F.2d at 1270. These two factors clearly distinguish *Flaherty* from the case *sub judice*.

First, in *Flaherty*, the *only* factor that justified the preliminary injunction was the disparate impact of the test. 983 F.2d at 1270 (emphasis added). Subsequent to the entering of the preliminary injunction, the standard for judging disparate impact justifications was heightened by this Court in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), a standard which the Third Circuit applied in *Flaherty* to dissolve the injunction. 983 F.2d at 1273-75. In the case *sub judice*, however, the Consent Decree was entered into not because of a disparate impact in any test, but because of the alarming dearth of minorities in the Cincinnati Fire Division. Although the issue of whether there was discrimination in the hiring of minorities was not tried before the District Court in 1974 because of the negotiated settlement embodied by the Consent Decree, the Sixth Circuit was persuaded by the fact that the number of minority firemen in the Fire Division was *one half of one percent*, a fact which justified the Consent Decree. *Youngblood v. Dalzell*, 568 F.2d 506, 508 (6th Cir. 1978) (emphasis added). In addition, the preliminary injunction in *Flaherty* prescribed a one-for-

one quota, whereas the Consent Decree at issue here set forth hiring *goals*. The distinction between a hiring goal and a quota is important. *See Johnson v. Transportation Agency*, 480 U.S. 616, 639, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987).

Secondly, there is a distinct difference between a preliminary injunction and a consent decree. This distinction is highlighted by this Court's recent decision in *Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748, 757-58, 116 L.Ed.2d 867 (1992), where this Court held that consent decrees are subject to modification under the guidelines of Federal Rule of Civil Procedure 60(b). Case law establishes that the *party seeking to modify* a judgment must establish extraordinary circumstances in order for a court to grant relief under Fed.R.Civ.P. 60(b).[6] *E.g.*, *Ackermann v. United States*, 340 U.S. 193, 202, 71 S.Ct. 209, 95 L.Ed. 207 (1950); *Mallory v. Eyrich*, 922 F.2d 1273, 1281 (6th Cir. 1991). On the other hand, a heavy burden in *Flaherty* was on the *party seeking to uphold* the injunction which mandated the affirmative action policy. 983 F.2d at 1269, 1273. These two different standards, along with the other distinguishing characteristics discussed *supra*, militate against the finding that *Flaherty* and the decision of the court below are in conflict.

The second circuit court decision which the Petitioners claim conflicts with the decision below is a 1987

---

[6] This Court recently reaffirmed that a consent decree is essentially treated as a judgment. *Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748, 757 (1992) (citing *Railway Employees v. Wright*, 364 U.S. 642, 650-51, 81 S.Ct. 368, 372-73, 5 L.Ed.2d 309 (1961).

Title VII case from the District of Columbia. *Ledoux v. District of Columbia*, 820 F.2d 1293 (D.C. Cir. 1987), however, wholly fails to support the Petitioners' claim. In fact, the court of appeals was faced with a voluntary affirmative action plan embodied by a consent decree and which dealt with the *promotion* of employees rather than the *hiring* of prospective employees. *Ledoux*, 820 F.2d at 1296-97. The court's discussion, *id.* at 1302-03, and opinions of this Court, *e.g.*, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282, 106 S.Ct. 1842, 90 L.Ed.2d 260, *reh'g denied*, 478 U.S. 1014, 106 S.Ct. 3320, 92 L.Ed.2d 728 (1986) (plurality opinion) highlight that affirmative action plans involving hiring goals do not impose the same type of intrusive injuries as do other remedial measures such as promotions or layoffs. Along the same lines, the court, citing *Wygant*, 476 U.S. at 274-75; *Hazelwood School District v. United States*, 433 U.S. 299, 307-08, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), concluded that " 'gross statistical disparity' " alone could satisfy the constitutional requirement of a remedial purpose as articulated by this Court.[7] This is entirely consistent with the case *sub judice*, because at the time the litigation which led to the Consent Decree was commenced, minorities consisted of only one half of one percent of the Fire Division, surely a "gross statistical disparity". *See Youngblood v. Dalzell*, 568 F.2d 506, 508 (6th Cir. 1978). Finally, the *Ledoux* court upheld the affirmative action at issue in that case, 820 F.2d at 1304-06; therefore,

---

[7] This Court specifically stated that "gross statistical disparities . . . alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Hazelwood School District v. United States*, 433 U.S. 299, 307-08, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1978).

the City-Respondent fails to see how the court "condemned" such affirmative action plans nor does the City-Respondent understand how there is a conflict between the circuits (Brief of Petitioners 24). The opinion in *Ledoux*, moreover, in addition to not conflicting with the decision below, has been vacated by an *en banc* court. *Ledoux*, 820 F.2d 1293 (D.C. Cir.), *reh'g granted en banc*, 833 F.2d 368 (1987), *opinion vacated*, 841 F.2d 400 (1988).

No decision of a circuit court has been set forth which is in conflict with the decision of the court of appeals below. In fact, the only appellate court that has decided the issue before this Court has held in accord with the Sixth Circuit. *See Mackin v. City of Boston*, 969 F.2d 1273 (1st Cir. 1992), which will be discussed *infra*. What the Petitioners miscomprehend is that the issue in this case is much narrower than the issue the Petitioners suggest is ripe for review by this Court (Brief of Petitioners 12). Once this Court analyzes the narrow issue presented for review, it will become apparent that there are no reasons warranting review of this appeal.[8]

---

[8] The Petitioners make reference to *Billish v. City of Chicago*, 969 F.2d 1269 (7th Cir. 1992) (Brief of Petitioner 25). This decision has subsequently been reversed (5-4) *en banc* by the Seventh Circuit. *Billish v. City of Chicago*, ___ F.2d ___, 1993 WL 88375 (7th Cir., March 29, 1993). The decision deals with a dual list scheme for implementing an affirmative action plan. *Billish*, ___ F.2d ___, 1993 WL 88375 (App. 1). Although a cursory reading of the opinion may give the impression that the case is at odds with the decision of the court below, a careful reading militates against this conclusion. First, the decision revolves around promotion practices rather than hiring practices, *Billish*, ___ F.2d ___, 1993 WL 88375 (App. 1), and as was discussed earlier, two different standards apply. Second, there were additional factual

II. QUESTION PRESENTED FOR REVIEW

Can a valid consent decree entered into by a municipality to remedy prior racial discrimination be modified by a district court before the court makes the relevant findings of fact necessary to modify the decree?

Before discussing the narrow issue presented in this appeal, some points need to be briefly addressed in order to respond to some of the Petitioners' arguments. First, it must be kept in mind that the City's hiring policies have been implemented pursuant to a valid consent decree. The United States Court of Appeals for the Sixth Circuit has upheld the validity of the Consent Decree at issue here on numerous occasions. (Petitioners' App. 13-30); *Youngblood v. Dalzell*, 925 F.2d 954 (6th Cir. 1991); *Youngblood v. Dalzell*, 804 F.2d 360 (6th Cir. 1986), *cert. denied*, 480 U.S. 935, 107 S.Ct. 1576, 94 L.Ed.2d 767 (1987). Moreover, in each of these cases, the Sixth Circuit upheld the "dual list scheme" employed by the City of Cincinnati in the hiring of Fire Recruits (Petitioners' App. 22-23). ("[I]n the several appeals involving the City's Fire Division consent decree that have come before this Court, this

---

distinctions between the cases. *Compare Billish*, ___ F.2d ___, 1993 WL 88375 (App. 9), with *Jansen v. City of Cincinnati*, 977 F.2d 238, 243, for example (EEOC's "content validation" guidelines (29 C.F.R. 1607.5) for employment tests were met in the former while they were not met in the later). Finally, and probably most importantly, the Seventh Circuit did not reject the use of the dual list scheme, but rather, the court held that a trial on the merits before the district court was needed. *Billish*, ___ F.2d ___, 1993 WL 88375 (App. 1, 5, 15-16) (remanding to the district court). As will be explained in the next section, the resolution of this case similarly should be decided by the district court on remand after appropriate factual findings are made.

Circuit has validated, *sub silentio*, the City's use of dual lists for hiring purposes").

The Petitioners argue that these previous cases, however, were inconsistent with this Court's decisions in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501, 109 S.Ct. 1010, 98 L.Ed.2d 976 (1989) and *Hazelwood*, 433 U.S. 307-08, claiming that no statistics established that the City had previously discriminated in the hiring of Fire Recruits, claiming that the City never admitted discrimination, and claiming that "there was no judicial finding of discrimination" (Petitioners' App. 13-14). The Petitioners, however, erroneously overlook critical facts and legal principles which cast doubt on each of Petitioners' three arguments. One, when the Consent Decree was entered into, there was a gross statistical disparity which justified the City's implementation of an affirmative action plan. Specifically, in 1973, the year before the Consent Decree was entered into, the City firefighter force was only 0.5% African-American. The Petitioners' argument that "merely reciting that there is a 'manifest imbalance' in the Fire Division is hardly tantamount to a statistical finding of discrimination" (Petitioners' App. 15-16) ignores the facts which surround the entering of the Consent Decree and further miscomprehends the decisions of this Court that sanction remedial actions upon a showing of wide or gross statistical disparities. *Wygant*, 476 U.S. at 274-75; *Hazelwood*, 433 U.S. at 307-08. Two, and related to the preceding principle, it is not necessary that judicial findings of discrimination be made before a public employer provides race conscious relief via a consent decree. *Howard v. McLucas*, 871 F.2d 1000, 1008 (11th Cir. 1989) (citing *Wygant*). Finally, although at

the outset the City denied engaging in racial discrimination, the City subsequently acknowledged that past practices might have given rise to " 'an inference of a pattern or practice of discrimination' " against minorities. *Youngblood*, 925 F.2d at 955.

The next two points were alluded to earlier. One, the City implements hiring *goals* pursuant to the consent decree, not quotas similar to those in *Regents of University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) which the Petitioners cite for support. Hiring goals do not "unnecessarily trammel the interests" of the white applicants, nor are they "an absolute bar" to the white applicants' attaining positions with the Fire Division.[9] *Johnson*, 480 U.S. at 630. The United States Court of Appeals for the Sixth Circuit has specifically found that the "dual list" system implemented pursuant to the Consent Decree "does not contain quotas", but rather, it contains hiring goals. *Youngblood v. Dalzell*, 804 F.2d at 364.

Moreover, unlike the Petitioners' arguments, the City hires only qualified minorities as Fire Recruits. Each individual must pass all five tests that make up the Fire Recruit hiring process. The fact that a white applicant scored higher on the written test than a minority applicant does not violate this Court's requirement that the prospective pool of employees must be "qualified". Under the City's written test, a qualified applicant is one who attains a score of seventy (70) or above. The City only hires applicants who attain a score of seventy or

---

[9] As previously mentioned, many of the original Petitioners have subsequently obtained employment as firefighters in the Fire Division.

above, each of whom are therefore "qualified". As the court of appeals below concluded, "[t]he [written] test merely ensures, as required by the consent decree, that each fire recruit is 'qualified' " (Petitioners' App. 24 (referring to Paragraph 22 of the Consent Decree (Petitioners' App. 41)). The written test accomplishes this goal, and as the court below concluded, "each of the minorities placed on the eligible list was qualified to be hired" (Petitioners' App. 24).

Secondly, the challenge here revolves around the *hiring* of Fire Recruits. Compared to more intrusive remedial actions such as affirmative action plans that involve race-conscious promotions and layoffs, which necessarily effect job security, benefits, and seniority, "in cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally." *Wygant*, 476 U.S. at 282. "Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury as layoffs impose." *Wygant*, 476 U.S. at 282.

As a final note, this Court requires that a non-minority party challenging the application of an affirmative action plan has the ultimate burden of establishing that their constitutional rights have been violated. *Wygant*, 476 U.S. at 277-78, 293. Taking into account all the factors previously discussed, the Petitioners have not met this burden.

Although necessary to refute some of the Petitioners' claims, the prior discussion was not necessarily required for this Court to decide whether to grant a writ of certiorari to the Sixth Circuit. That is because the issue that

the Petitioners claim is before this Court is not the correct issue presented. Rather, the issue is much narrower, and can be addressed briefly. The proper issue has been framed by two of this Court's recent decisions.

In *Rufo*, 112 S.Ct. at 757, this Court held that modification of a consent decree is subject to Federal Rule of Civil Procedure 60(b). In *Dowell*, 111 S.Ct. at 638, this Court concluded that before modifying a desegregation decree intended to remedy past discrimination against African-Americans, the district court must determine "whether the vestiges of past discrimination had been eliminated to the extent practicable." In considering whether the vestiges of discrimination had in fact been eliminated, "the District Court should look at not only student assignments, but 'to every facet of school operations – faculty, staff, transportation, extracurricular activities and facilities.' " *Dowell*, 111 S.Ct. at 638. From these two cases, two clear legal principles evolve:

(1) When a party seeks to modify a valid consent decree, a district court should apply the standards of Fed.R.Civ.P. 60(b) and this Court's decision in *Rufo*.

(2) To determine, in fact, whether all the goals of the decree have been met, the district court must look at all the germane facts to the extent practicable, as in *Dowell*.

As to the first principle, two of the most widely recognized requirements of Rule 60(b) are that it is an extraordinary remedy which is not to be lightly granted, *e.g.*, *Ackermann*, 340 U.S. at 202; *Mallory*, 922 F.2d at 1281, and that a motion thereunder does not bring up the original judgment (the decree in this case) for review. *E.g.*, *Browder v. Director, Dept. of Corrections*, 434 U.S. 257,

263 n.7, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978) (and cases cited). Also, "a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants a revision of the decree." *Rufo*, 112 S.Ct. at 760. The district court below, however, did not apply Rule 60(b) to the consent decree at issue in this case, nor did it have the guidance of *Rufo* (Petitioners' App. 1-12).

As to the second principle, at the very least, it would require the district court to respond to claims by a certified class of African-Americans who intervened in the lawsuit claiming ongoing discrimination within the Fire Division. Surely, this Court's instruction that "district court should address whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable" would require a district court to take into account claims by the African-American class that the vestiges of prior discrimination had not in fact been eliminated. *Dowell*, 111 S.Ct. at 638. The decision below applied prior circuit precedent entirely consistent with the instruction in *Dowell* and which held that "[b]efore the district court dissolves the decree, it must determine that the goals of the consent decree have been achieved *and must consider all objections to such dissolution*" (Petitioners' App. 28, *citing Youngblood*, 925 F.2d at 961). As the court of appeals below found, however, the district court did not address the claims by the African-American class *that were pending before the district court* (Petitioners' App. 29) (emphasis added).

A recent case out of the First Circuit is on all fours with the case at bar. *See Mackin v. City of Boston*, 969 F.2d 1273 (1st Cir. 1992). The factual background in *Mackin*

was almost identical to the case *sub judice*: White applicants for positions as municipal firefighters scored higher on the written examination portion of the selection process than did certain minority applicants, yet were ranked below the minority candidates. 969 F.2d at 1274-75. The white applicants were ranked below some of the minority applicants because of a consent decree entered into in 1974 that set certain hiring goals for minorities. *Mackin*, 969 F.2d at 1274-75. The consent decree was implemented through a system where the eligibility list was to consist of one minority candidate for each white candidate. *Mackin*, 969 F.2d at 1274 n.2.

The legal analysis employed by the court was also similar to the legal principles the City-Respondents urge should be applied in the case *sub judice*. Citing *Rufo* and *Dowell* in the same paragraph, the First Circuit employed an analogous legal standard applied by the City-Respondent. In short, the court required the white applicants to meet their burden of showing that changed circumstances warranted the modification of the consent decree by the district court (citing *Rufo*) and that the district court should determine whether the goals of the decree had been completely achieved (citing *Dowell*). *Mackin*, 969 F.2d at 1275-76.

The court further reasoned that only qualified minority applicants were considered for employment; that the affirmative action plan gave only a limited advantage, not a guarantee of employment, to these qualified applicants; and that no legitimate, firmly rooted expectations on the part of the white applicants were disturbed. *Mackin*, 969 F.2d at 1278. These reasons were similarly addressed by the City-Respondent, *supra*.

Accordingly, this Court should not accept a review of this case in part because of the state of the record below. The district court's order was on cross motions for summary judgment; therefore, many of the factual issues that need to be resolved before the Consent Decree can be modified have yet to be determined. It would be more prudent to wait until the fact finder determines, on remand, all the material factual issues rather than resolving this case without an adequate exploration of the facts. That is what the court of appeals below intended when it remanded the case to the district court (Petitioners' App. 30). Moreover, the reasons warranting review cited by the Petitioners – the circuit split and the inconsistent application of this Court's precedent – simply do not exist. Accordingly, review of the decision below should be denied.

CONCLUSION

For all the reasons set forth in this brief, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

MARK C. VOLLMAN
Counsel of Record
Assistant City Solicitor
Rm 214 City Hall
801 Plum Street
Cincinnati, Ohio 45202
(513) 352-3350

FAY D. DUPUIS
City Solicitor

Attorneys for Respondents

APPENDIX

Earl BILLISH, et al., Plaintiffs-Appellants,

v.

CITY of Chicago, et al., Defendants-Appellees.
CHICAGO FIRE FIGHTERS UNION, et al.,
Plaintiffs-Appellants,

v.

Richard M. DALEY, et al., Defendants-Appellees.
Nos. 90-1650, 90-2182.
United States Court of Appeals,
Seventh Circuit.
Argued December 7, 1990.
Decided May 4, 1992.
REARGUED EN BANC DECEMBER 15, 1992.
DECIDED MARCH 29, 1993.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 87 C 8731, 87 C 7295-James B. Zagel and James F. Holderman, Judges.

Before BAUER, Chief Judge, and CUMMINGS, CUDAHY, POSNER, COFFEY, EASTERBROOK, RIPPLE, MANION, and KANNE, Circuit Judges.

POSNER, Circuit Judge.

*1 We granted rehearing en banc to examine the following difficult and important question: In what circumstances can admitted racial discrimination, challenged as a violation of the equal protection clause because committed by an organ of state government, be upheld as a proper remedial measure when there has been no trial to determine whether the discrimination can survive "strict scrutiny"? For that is the constitutional standard applicable to

discrimination against as well as in favor of whites. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). A divided panel of this court upheld the district court's grant of summary judgment for the defendants in one of two cases that had been consolidated for appeal, but reversed it in the other, *Billish v. City of Chicago*, No. 90-1650, *Chicago Fire Fighters Union v. Daley*, No. 90-2182, on the ground that the district judge (a different one) had failed to apply the standard of strict scrutiny to the defendants' conduct. 962 F.2d 1269 (7th Cir. 1992). Because the district court decided the cases on summary judgment, we can affirm only if, had the record before the district court in the two cases been the record of a complete trial, the defendants would have been entitled to a directed verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 251 (1986); *Cygnar v. City of Chicago*, 865 F.2d 827, 834 (7th Cir. 1989).

The cases are so similar that we can treat them as if they were one. Both involve challenges to racial favoritism in promotions within the uniformed ranks of the Chicago Fire Department. The ranks are firefighter, engineer, lieutenant, captain, and battalion chief, but the last is not in issue. Promotions are made on the basis of competitive examination. Eligibility to sit for an examination is limited to persons in the rank below, except that a firefighter may, if he wants, sit for the lieutenant's examination, and be promoted to lieutenant, without spending any time as an engineer. The record is silent on whether there is some minimum amount of time that one must spend in one's present rank before being eligible for promotion; but as examinations for promotion are not given every year, there would be delays in promotion

even if there were no required waiting periods. After an examination is administered and graded, the candidates are ranked from first to last on the basis of their grades and are placed in rank order on an eligibility list from which promotions to the next rank are made. All listed persons whose grades are above a cut-off point deemed to mark minimum eligibility – all, in short, who have a passing grade on the examination – are eligible for promotion to the next rank.

In 1986 the fire commissioner, defendant Galante, promoted eighteen lieutenants to captain on the basis of their rank order in a captains' eligibility list that had been compiled in 1979, the last time the captains' exam had been given. All the promoted lieutenants were white. Only two members of recognized minorities (blacks and Hispanics, so far as relevant to this case) were left on the list, and their scores on the captain's exam were well below the cut-off point. The commissioner asked the personnel department to lower the cut-off point, and it did. He then, early in 1987, promoted the two minority candidates to captain out of rank order. The plaintiffs in the *Billish* case are white lieutenants who had scores above the (old) cutoff point on the 1979 list and were passed over when the two minority lieutenants were promoted over them. They also complain because, the list having become all-white after the minority lieutenants were promoted to captain, the commissioner refused to make further promotions from the list, deciding instead to await the compilation of a new list based on a new exam.

*2 In 1987 new eligibility lists were compiled to guide promotion from firefighter to engineer and from lieutenant to captain. These lists were based on examinations

administered between 1985 and 1987; part of the engineer's exam was "race normed" to improve the scores of the blacks and Hispanics who took it. From these lists Commissioner Galante in 1987 ordered the promotion of 56 firefighters to engineer and 24 lieutenants to captain. The first 48 promotions to engineer were made in rank order and included 9 minority candidates; the last 8 promotions were of black firefighters taken out of rank order. The first 23 promotions to captain were made in rank order and included 5 blacks (no Hispanics); for the twenty-fourth, the commissioner reached down for a Hispanic and promoted him out of rank order. These departures from rank order were in conformity with a 25 percent goal, established by the Washington administration, for minority promotions in the fire department. The plaintiffs in the Chicago Fire Fighters case are the whites passed over for promotion to engineer or captain as a result of the promotion of nonwhites out of rank order in the 1987 eligibility lists.

The blacks and Hispanics promoted out of rank order to the detriment of the promotional opportunities of the plaintiffs in these two cases were promoted because of their race or ethnicity. The equal protection clause forbids states to give preference to persons on the basis of their race (or ethnicity, but this needn't be discussed separately), even if theirs is not the white race. *City of Richmond v. J.A. Croson Co., supra,* 488 U.S. at 493; *United States v. City of Chicago,* 870 F.2d 1256, 1261 (7th Cir. 1989). To that extent the Constitution is truly colorblind. The Supreme Court has, however, carved an exception for the case in which discrimination against whites is necessary

to rectify previous discrimination in their favor committed by the state agency that is seeking to practice remedial discrimination. *City of Richmond v. J.A. Croson Co., supra,* 488 U.S. at 509; *Wygant v. Jackson Board of Education,* 476 U.S. 267, 280 (1986) (plurality opinion); *Associated General Contractors of California, Inc. v. Coalition for Economic Equity,* 950 F.2d 1401, 1412 (9th Cir. 1991). We must decide whether the defendants have so far succeeded in bringing themselves within the exception that no reasonable trier of fact could doubt that the discriminatory promotions described above were appropriate remedial measures; only then would the defendants be entitled to summary judgment, foreclosing the plaintiffs' right to a trial. Since a discriminatory remedy, to pass constitutional muster, must discriminate no more than is necessary to rectify the discrimination for which it is the remedy, *City of Richmond v. J.A. Crosson Co., supra,* 488 U.S. at 505-08; see also *Wygant v. Jackson Board of Education, supra,* 476 U.S. at 274 (plurality opinion), we must consider not only whether the Chicago Fire Department ever discriminated unlawfully in favor of whites but also whether, if so, the curative measures taken in these two cases have been carefully designed to avoid unnecessary injury to white persons.

*3 Although there has never been a formal judicial determination that the Chicago Fire Department ever discriminated in favor of whites, we do not understand the plaintiffs to deny that, for at least a brief period of time after the date in 1972 on which Title VII of the Civil Rights Act of 1964 first became applicable to states and municipalities, the department was in violation of that

statute under a "disparate impact" theory of discrimination. The fact that when the city first came under the Act the percentage of blacks and Hispanics in the uniformed ranks of the fire department – 5 percent – was far lower than their percentage in the relevant labor market would not of course have established a violation, *Hazelwood School District v. United States*, 433 U.S. 299, 309 (1977), but the city appears to have violated the Act by not changing, when the Act became applicable to the city, the hiring practices responsible for this disparity, or showing that they were essential to the department's efficient operation. Id. at 309 n. 15. The objectionable hiring practices were, however, eliminated by a consent decree entered in 1974 in a suit against the city brought by the Department of Justice. Promotions were the subject of a separate consent decree, entered in 1980 in another suit by the Justice Department against the city. This decree required the fire department to compile new eligibility lists on the basis of new tests properly validated as fair to minorities, and in promoting from the old lists to engineer or lieutenant to promote one black or Hispanic for every four whites who were promoted.

Assuming, then, that there was actionable discrimination in favor of whites in hiring from 1972 to 1974 and in promotions from 1972 to 1980, we come to the question of the appropriateness of the fire commissioner's actions in 1987 as measures for rectifying that discrimination. Even if the measures had been required by the consent decree, which they were not – the decree contained no captain's quota at all, and the quotas for engineers and lieutenants were only 20 percent and are thus exceeded by the measures challenged here – this would not be a

defense. The plaintiffs were not parties to the decree and there was no judicial determination that the decree was necessary to rectify previous discrimination. *Martin v. Wilks*, 490 U.S. 755 (1989); *United States v. City of Chicago*, 978 F.2d 325, 330 (7th Cir. 1992); *People Who Care v. Rockford Board of Education*, 961 F.2d 1335, 1337 (7th Cir. 1992); *Donaghy v. City of Omaha*, 933 F.2d 1448, 1456-58 (8th Cir. 1991). The decree moreover was entered before the *Croson* decision made clear that reverse discrimination is subject to strict scrutiny. The civil rights amendments enacted in 1991 forbid challenges to civil rights consent decrees by persons having "actual notice" of the decree and a "reasonable opportunity to present objections" to it, 42 U.S.C. sec. 2000e-2(n)(1)(B)(i), but the city does not argue either that the provision applies to this case or that, if it did, it would bar these suits.

*4 We have three sets of promotions to consider. The first, of 20 lieutenants to captain, was from an old eligibility list – that is, an eligibility list based on an examination given before the 1980 consent decree: the 1979 list of lieutenants who had taken the then most recent captain's test. The second set of promotions was of the 56 firefighters promoted to the rank of engineer on the basis of an examination given in 1985. The third set consisted of the 24 lieutenants promoted to captain on the basis of a two-part examination given in 1986 and 1987.

The city's strongest case for legitimate remedial discrimination involves the promotion of the two minority lieutenants to captain in January 1987. At the time, the only eligibility list for captain had been compiled in 1979 on the basis of an examination that had not been validated for racial neutrality. Neither of the two minority

lieutenants on that list had sc[illegible]es above the cut-off point. The commissioner had just ordered the promotion of eighteen lieutenants from the list – all white. Only 4 percent of the captains in the Chicago Fire Department at the time were nonwhite, while 29 percent of the firefighters (the lowest rank) were. By reaching down to the two minority lieutenants who were below the cut-off point, the commissioner caused 10 percent of the promotions to captain to be of nonwhites, and this was a percentage such lower than that of nonwhites in any of the lower ranks.

Yet at the time the commissioner acted, it was plain that the compilation of a new eligibility list, one based on examinations designed under the aegis of the consent decree and therefore presumptively unbiased, was only months away, for the department had already administered the first half of a new captains' test. And in fact by October 1987 the new eligibility list had been compiled and new promotions made from it. It is not argued that the department had a desperate need for two more captains in January, that it couldn't wait till October. It seems that, distressed by the all-white composition of the group of captains appointed in the latest round of promotions, Commissioner Galante decided to appoint possibly unqualified blacks without waiting to see how blacks would perform on a race-neutral examination. If that is what happened – a question for trial – it would not bespeak the kind of sensitivity to the importance of avoiding racial criteria in making employment decisions, whenever it is possible to do so, that *Croson* requires. It should be unnecessary to add that a public employer cannot be allowed to justify reverse discrimination by the

bootstrap method of an alternating sequence of racial promotions (or hires). That is, the city cannot get points for first using a presumptively biased eligibility list to make a string of white promotions and then turning around and trying to do some rough racial justice by promoting two blacks from the bottom of the list.

Of course if the city had a desperate need for twenty captains just then, and the only eligibility list it had was based on a quite possibly biased examination that had been given in 1979, a modest departure in favor of remedial racial balance might well be justified. When the new captains' examination was finally administered, 21 percent of the lieutenants promoted to captain on a strict rankorder basis with no racial favoritism were black, which is more than twice the percentage under the old list even after Commissioner Galante promoted the two black lieutenants out of rank order. But the record does not reveal whether the city had an urgent need for twenty captains and thus could not await the administering and scoring of an unbiased exam.

*5 If on remand the promotion of the two black lieutenants out of rank order does not survive strict scrutiny, it does not follow that the *Billish* plaintiffs will win. They have no vested rights in their position on an eligibility list compiled on the basis of an examination that may have been biased in favor of whites. They will have to show that if promotions had been delayed until the 1987 list was available, and made from that list, they would have been promoted sooner than they were.

The engineer examination administered in 1985 was devised by the city, of which Harold Washington, a black,

was now the mayor, with the aid of an academic expert; in consultation with the Justice Department, which had brought the suit concluded by the consent decree entered in 1980; and in apparent or at least intended conformity with the EEOC's guidelines for "content validation" of employment tests. 29 C.F.R. sec. 1607.5. Moreover, the examination was approved by the district court. The first part of the examination was a written test. The ratio of the minority pass rate to the white pass rate was less than the 80 percent benchmark that the EEOC and other federal agencies use to decide whether an employment test has a racially adverse impact. So the city raised the minority candidates' scores sufficiently to increase the ratio to 84 percent. Candidates could sit for the second half of the examination, a "hands on" practical test (operating a fire-engine simulator), only if they passed the written test, the scores on which, as we just noted, had been adjusted to minimize the adverse impact on blacks and Hispanics. The practical test did not require a racial adjustment, because on it the ratio of the minority to the white pass rate was 87 percent. Rank order on the eligibility list for promotion to engineer was based on performance on the practical test, weighted 10 percent by seniority.

Had the department stuck to rank order, 10 of the 56 firefighters promoted to engineer would have been black or Hispanic, which is 18 percent, very near the quota set by the consent decree. Instead, by promoting 8 more nonwhites, taken out of rank order, the department raised this percentage to 30 percent. Yet not only had the examination been approved by the parties to the consent decree – by the Justice Department, which had originally

challenged the fire department's promotion procedures as unlawfully discriminatory in favor of whites, and by the City of Chicago, which under the Washington administration could hardly be though insensitives to the interests of minority groups. *Auriemma v. Rice*, 910 F.2d 1449, 1451 (7th Cir. 1990) (en banc); *Cygnar v. City of Chicago*, 865 F.2d 827, 835 (7th Cir. 1989); *United States v. City of Chicago*, 870 F.2d 1256, 1257-58 (7th Cir. 1989); *United States v. City of Chicago*, 894 F.2d 943, 949 (7th Cir. 1990) (concurring opinion). In addition, the scores on the examination had been altered to improve the performance of nonwhites – the practice of "race norming" now forbidden by federal law. 42 U.S.C. sec. 2000e-2(1). In these circumstances, the departures from rank order could not be justified – at least with the certitude required to head off a trial – on the ground that the order had been based on a discriminatory test.

*6 The City has, it is true, presented evidence that the test which it devised was subtly, unconsciously, biased in favor of whites, after all. The evaluation of that evidence is a matter for trial. That the city was determined to achieve or exceed its new goal of 25 percent minority promotions. regardless of what any test showed, is suggested by its insistence that "content validation" is not an adequate method of validating an employment test. To validate a test for content means to establish that it tests for skills or knowledge used on the job: a typing test for secretaries, for example. The city designed the engineers' test as one that would be content validated, as distinct from a "criterion validated" test, which tests qualities predictive of or correlated with job performance (such as IQ). The law is clear that either method of validation is

proper. *Gillespie v. Wisconsin*, 771 F.2d 1035, 1040-41 (7th Cir. 1985); 29 C.F.R. sec. 1607.5(A). Now the city has backtracked, claiming that content validation is no good, and even suggesting that the fact that whites do better than others on a test proves that the test is biased even if it has been validated. Again, the law is to the contrary. "There is no iron law of human behavior that every racial or ethnic group will perform equally well on nonbiased examinations in all fields of human endeavor." *United States v. City of Chicago, supra*, 870 F.2d at 1261; see also *City of Richmond v. J.A. Croson Co., supra*, 488 U.S. at 503. The city's grounds for rejecting the results of its test sound like pretexts designed to give the city more freedom to practice reverse discrimination by departing from rank order fixed by nonbiased tests. It will require a trial to determine whether this is in fact the city's motive in repudiating its own test.

The city argues that the disparity between the percentage of minority firefighters (29) and the percentage of minority engineers (11) justified heroic efforts, even ones that might require disregarding the results of a perfectly fair test, to advance minority firefighters by way of remedy for previous discrimination in favor of whites. The disparity by itself proves little, and this for two reasons. First – a point explained next – the much larger percentage of entry-level blacks and Hispanics may reflect nonactionable discrimination in years past. Second, the larger minority fraction of firefighters than of engineers may have reflected, to a degree as yet unexplored, the effects of a 50 percent minority hiring quota fixed in the 1974 consent decree. If, to take an example closer to home, law schools through their affirmative-action programs

increased the percentage of minority law students to 10 percent, the fact that law school faculties were on average only 2 percent black would not be evidence of discrimination in appointments to faculty positions. The larger fraction of minority students would be an artifact of the law schools' having lowered their admission standards and not a true measure of the pool from which faculty would be recruited.

*7 We come to the last set of promotions. Had the city promoted lieutenants to the rank of captain on the basis of the 1987 captains' eligibility list strictly on the basis of rank order, 5 out of the 24 promotions, or 21 percent, would have been of minority candidates – all as it happened black. Apparently distressed that none of the successful candidates was Hispanic, the fire commissioner promoted a Hispanic lieutenant to captain out of rank order. The result was to increase the minority representation in the promotions from 21 to 25 percent. The City points to the very small percentage of minority captains in 1987 – only 4 percent – and asks us to infer that this must have been a legacy of discrimination. Although the record contains no evidence on the required or average waiting period in one rank before promotion to the next, it is common sense that working one's way up the ladder to the fire department's second-highest rank may well take many years. Hence a consequence of the very low hiring of minority firefighters before 1974 may have been that in the middle 1980s only a tiny fraction of captains consisted of blacks and Hispanics. From this it can be argued that racial discrimination in their favor was necessary to bring the percentage of captains from these groups nearer to where it would have been but for the

discrimination that the groups had experienced many years earlier.

This of course is possible, but has not been shown, and in fact is unlikely. Recall that, so far as appears, the city was guilty of no actionable discrimination in hiring for the fire department until 1972, and that the discrimination was rectified in 1974. That the small fraction of minority captains in the mid-1980s was due to any very great extent to the limited hiring of minority firefighters between 1972 and 1974 is implausible. Of course it is possible that the city had been violating the Constitution, and not just the standards of Title VII not yet applicable to it, before 1972, by engaging in intentional discrimination in favor of whites. But of this there is no evidence. And it is difficult to see how discrimination aimed at remedying conduct lawful when engaged in (that is, before 1972) could be thought remedial in the relevant sense and survive strict scrutiny; the Court's dicta suggest it could not. *City of Richmond v. J.A. Croson Co., supra,* 488 U.S. at 500; *Wygant v. Jackson Board of Education, supra,* 476 U.S. at 289 (O'Connor, J., concurring); *Regents of University of California v. Bakke,* 438 U.S. 265, 307 (1978) (opinion of Powell, J.).

Another possibility is that minority captains were so few in the mid-1980s not because there were so few minority hires before 1974 but because of discriminatory promotional policies not rectified until the 1980 consent decree – indeed not until later, since promotions based on validated captains' tests were not made until 1987. That is another issue requiring further exploration.

Even disregarding these points, we note that, by 1987, 14 percent of the lieutenants in the fire department were black or Hispanic, and with a higher percentage of black and Hispanic lieutenants than this – 21 percent – being promoted to captain without any "race norming" or other discrimination in their favor on the captain's examination, there would in all likelihood soon have been a large percentage of minority captains even if promotions were made on a colorblind basis. The question becomes whether accelerating the process by departing from colorblind procedures was justifiable as a means for rectifying the discrimination in which the department may have engaged in the 1970s. Perhaps so, but an alternative possibility – supported by the testimony of the city's own expert that rank-order promotion from the 1987 captains eligibility list would have yielded 4.7 percent Hispanic promotions, the only problem being that there were no Hispanics in the first group to be promoted from the list – is that the department was merely trying to curry favor with Hispanics by promoting a Hispanic lieutenant out of rank order. It is impossible to choose between these hypotheses on the basis of the record compiled in the summary judgment proceedings.

*8 There is concern and resentment about the use of policies of affirmative action or (more bluntly) reverse discrimination to practice a form of racial politics that is the mirror image of discrimination against blacks and other minority persons. There is fear that persons who have not been discriminated against will be advanced at the expense of persons who have neither practiced nor benefited from discrimination. The Supreme Court in the Croson decision made clear that cities and states would

have to furnish convincing evidence that their affirmative-action programs were not of this character but were instead sensitive, good-faith measures to remedy the unlawful practices in which they had engaged in the past. The defendants have not shown this strongly enough to permit the dismissal of the plaintiffs' claims without a trial.

These cases, filed in 1987, were first argued in this court more than two years ago. We regret the delay in deciding them and would like to bring them to an end but have concluded that it was premature to terminate them by a grant of summary judgment. In the hope of expediting the proceedings that must resume in the district court we direct that the cases be consolidated in that court and assigned to a single judge.

REVERSED AND REMANDED, WITH DIRECTIONS.

RIPPEL, Circuit Judge, with whom BAUER, Chief Judge, CUMMINGS, and CUDAHY, Circuit Judges, join, dissenting.

These cases were resolved correctly, according to the law and the facts, in the panel opinion. 962 F.2d 1269 (7th Cir. 1992). For the reasons set forth in that opinion, the judgment in *Billish v. City of Chicago* (No. 90-1650), should be affirmed in part and reversed and remanded in part. The judgment in *Chicago Fire Fighters Union v. Daley* (No. 90-2182), should be affirmed.